No. 01-1877 (3)

...me Court, U.S.
FILED

SEP 10 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTONIO GRANADOS-MONDRAGON,

Petitioner,

—v.—

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Jessica S. Pers
Thomas P. Brown
Counsel of Record
HELLER EHRMAN WHITE
& MCAULIFFE LLP
333 Bush Street
San Francisco, California 94104
(415) 772-6000

Attorneys for Petitioner
Antonio Granados-Mondragon

6pp

REPLY BRIEF FOR PETITIONER

Unable to justify the practice of giving guilty pleas collateral estoppel effect, the INS instead claims that the circuits have not split over this question and that Mr. Granados-Mondragon would be deported even if his guilty plea were not given collateral estoppel effect. The INS is wrong on both counts. The circuit split on this question is plain and long-standing, and resolution of the question presented by Mr. Granados-Mondragon's petition will determine his future.

1. The circuits have split over whether guilty pleas have collateral estoppel effect in subsequent litigation. The Third Circuit does not give guilty pleas collateral estoppel effect in subsequent litigation. Although the INS insists that *Marroquin-Manriquez* v. *INS*, 699 F.2d 129 (3d Cir. 1983), says otherwise, that court obviously disagrees. Twice since *Marroquin-Manriquez* was decided, the Third Circuit has addressed the question of whether guilty pleas should be given collateral estoppel effect, and both times concluded that they should not without any mention of *Marroquin-Manriquez*. *See Bower* v. *O'Hara*, 759 F.2d 1117, 1125 (3d Cir. 1985) (holding that before collateral estoppel applies "[the issue sought to be precluded] *must have been actually litigated*' ") (emphasis in original); *Anela* v. *City of Wildwood*, 790 F.2d 1063, 1068 (3d Cir. 1986) (noting "[the Third Circuit's] interpretation of the Restatement (Second) of Judgments which does not give collateral estoppel effect to guilty pleas, but requires that the issue be *actually* litigated and determined by a valid and final judgment") (internal citations omitted). Likewise, although *United States* v. *Gallardo-Mendez*, 150 F.3d 1240 (10th Cir. 1998) was a criminal case, the grounds for the Tenth Circuit's decision in that case—differing standards of proof and complicating the plea process—apply as much to sub-

sequent civil and administrative proceedings as they do subsequent criminal cases. In fact, although the Tenth Circuit could have decided *Gallardo-Mendez* on Sixth Amendment grounds that would have limited its application to criminal cases, it chose not to do so. *See id.* at 1243. As for *Otherson* v. *Dept. of Justice*, 711 F.2d 267 (D.C. Cir. 1983), the passage of time has not diminished its precedential value. *Otherson* remains the law of the D.C. Circuit and makes clear that in that circuit, guilty pleas should not be given collateral estoppel effect. *See id.* at 277 n. 11. As Mr. Granados-Mondragon detailed in his petition, the Third, Tenth and D.C. Circuits have rejected the contrary views of the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits. *See* Pet. 10-18.

2. This schism will not resolve itself. As Mr. Granados-Mondragon explained in his petition, stray comments in various of this Court's opinions give lower courts enough ammunition to defend whatever position they choose to adopt on this issue. *See* Pet. at 18-22. Courts, like the Ninth, that give guilty pleas collateral estoppel effect can draw on such opinions as *Allen* v. *McCurry*, 449 U.S. 90, 95 (1980), and *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). *Allen*, of course, defines the trigger for collateral estoppel as the "full and fair opportunity to litigate" rather than actual litigation. 449 U.S. at 95. According to *McCarthy*, "a guilty plea is an admission of all the elements of a formal criminal charge." 394 U.S. at 466. Courts, like the Third, Tenth and D.C. Circuits, that go the other way on this issue cite a different set of cases, primarily *Haring* v. *Prosise*, 462 U.S. 306 (1983), and *North Carolina* v. *Alford*, 400 U.S. 25 (1970). *Haring* requires "actual litigation" before collateral estoppel applies and observes that with a guilty plea nothing is actually litigated. 462 U.S. 315-316.

Alford, of course, holds that a confession of guilt is not a essential element of a guilty plea. 400 U.S. at 37.

3. Mr. Granados-Mondragon has not conjured up either this split or this Court's role in sustaining it. Both are well documented. Professors Wright, Miller and Cooper commented upon them twenty years ago in the prior edition of their seminal treatise. *See* 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4474 (1981 ed.). They issued a call to this Court to take up the issue and "put an end to the present practice [of giving guilty pleas collateral estoppel effect." *Id.* § 4474, at 759. As the call has gone unanswered, Professors Wright, Miller and Cooper renewed it in the most recent edition of the treatise: "There is little reason for optimism, but it is to be hoped that the Supreme Court will one day put an end to the present practice." 18B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4474.1, at 459 (2002). They are not alone. As Mr. Granados-Mondragon noted in his petition, other commentators have noted the split, and nearly all have criticized the majority position. *See* Pet. at 18 n.11.

4. Contrary to the implication of the INS's brief, the course of Mr. Granados-Mondragon's life does in fact turn on resolution of this split. As the BIA and ILJ acknowledged in their opinions below, although the deportation order entered against Mr. Granados-Mondragon has two grounds—that he entered the country without inspection in violation of former section 241(a)(1)(B), 8 U.S.C. § 1251(a)(1)(B) (1994), and that he helped an alien (*i.e.*, his wife) enter the United States illegally in violation of former section 241(a)(1)(E)(i), 8 U.S.C. § 1251(a)(1)(E) (1994)—only the charge of entry without inspection matters. Because Mr. Granados-Mondragon was helping his wife into the country, the charge of alien smuggling is waivable under former section 241(a)(1)(E)(iii), 8 U.S.C.

§ 1251(a)(1)(E)(iii). *See* Pet. App. 14a ("Under Section 241(a)(1)(E)(iii), the respondent's deportability for having aided and abetted the illegal entry of his wife is waivable."). A non-citizen's effort to help a member of his or her immediate family enter the country does not provide a basis for deportation because it furthers the prime directive of the nation's immigration policy: family reunification. *See, e.g.*, U.S. Select Comm'n on Immigr. and Refugee Pol'y, *U.S. Immigration Policy and the National Interest* 112 (1981) ("[R]eunification of families serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well-being of the nation."). Even if Mr. Granados-Mondragon did not get a waiver of the alien smuggling charge, he would have been eligible to have the deportation order suspended. The BIA denied Mr. Granados-Mondragon's request for suspension of deportation based on the finding, which rests entirely on the collateral estoppel effect of his guilty plea, that he entered the country illegally on or about July 20, 1991. *See* Pet. App. 6a.

5. The charge of alien smuggling only highlights the injustice of this case. Although Mr. Granados-Mondragon did not enter the United States illegally on or about July 20, 1991, he did help bring his wife into the country as this nation's immigration laws specifically encourage. Then, in order to keep his wife out of jail, Mr. Granados-Mondragon entered a guilty plea to the charge of illegal entry and accepted the minimal sanction of a $10 fine and a 45-day stay in jail. Nevertheless, the INS has deemed Mr. Granados-Mondragon unfit to live in the United States and insists that his plea renders the truth of what he did on or about July 20, 1991 irrelevant. The INS does not even defend the rule under which it seeks to deport Mr. Granados-Mondragon, no doubt glad that this case did not happen to arise in one of the three

circuits in which the result would have been different. Before the INS succeeds in ejecting Mr. Granados-Mondragon from the country in which he has lived for twenty years, it should at least defend the legal doctrine that it claims compels this result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jessica S. Pers
Thomas P. Brown
Counsel of Record
HELLER EHRMAN WHITE
& MCAULIFFE LLP
333 Bush Street
San Francisco, California 94104

Attorneys for Petitioner
Antonio Granados-Mondragon

September 10, 2002